Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

MARGARET CHRISTIAN,
Petitioner,

v.

ST. ANTHONY'S MEDICAL CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer's interference with an employee's ability to obtain necessary, albeit aggressive, disabling treatment violates the Americans with Disabilities Act.

2. Whether the decision of the Court of Appeals is inconsistent with the prior decision of *Sarsha v. Sears, Roebuck, & Co., 3 F.3d 1035 (7th Cir. 1993)*, applying the summary judgment standard with "added rigor" in employment discrimination cases, where intent and credibility are crucial issues.

3. Whether the decision of the Court of Appeals rejecting the clear adequacy of Petitioner Margaret Christian's summary judgment evidence is inconsistent with the proper application of Rule 56 of the Federal Rules of Civil Procedure and the decision of this Court in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)*.

RULE 14.1(b) STATEMENT

The caption of this petition reflects all parties to the proceeding in the court whose judgment is being sought to be reviewed. Petitioner is not aware that St. Anthony's Medical Center, the respondent and the only corporate party to such proceeding, has any parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Margaret Christian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in favor of Respondent St. Anthony's Medical Center.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1-6) that gives rise to this petition is reported at 117 F.3d 1051 (1997). The opinion of the district court (App., *infra*, 13-26) is unreported. By order

dated July 30, 1997, the Seventh Circuit denied the petition for rehearing and suggestion for rehearing en banc (App., *infra*, 7-8).

JURISDICTION

The action in the District Court proceeded under 42 U.S.C. §§ 12101 *et seq*. seeking to enforce protection under the Americans with Disabilities Act. The District Court had jurisdiction under 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 636(c)(1), the parties consented to jurisdiction of a magistrate. The United States District Court for the Northern District of Indiana, Hammond Division dismissed Margaret Christian's case via summary judgment on November 8, 1996. Christian timely appealed the adverse judgment to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291, which appellate court affirmed in an opinion filed on July 1, 1997 (App., *infra*, 1-6). On July 30, 1997, the Seventh Circuit denied Christian's timely-filed petition for rehearing en banc and suggestion for rehearing en banc.

Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), by filing this petition within the ninety day time period provided by 28 U.S.C. § 2101(c) and Rule 13.3 of this Court.

STATUTORY PROVISIONS and RULE INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. and Federal Rule of Civil Procedure 56 are set out fully in the Appendix, *infra*, 27-32.

STATEMENT OF THE CASE

Christian brought an action under 42 U.S.C. §§ 12101 *et seq*. against St. Anthony's Medical Center (hereinafter "St. Anthony's") seeking damages in the form of back pay, compensatory damages and reinstatement. Christian alleged that her employment as a part-time environmental service aide at St. Anthony's was terminated in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. Specifically, Christian alleged that she was terminated shortly after disclosing to St. Anthony's her rare affliction with severe hypercholesterolemia, a condition in which there is an excessive amount of cholesterol in the blood, and her need for a treatment known as plasmapheresis, wherein all of the body's blood is drained, run through a filtering device to remove the bad cholesterol, and then returned to the body, because St. Anthony's regarded Christian as disabled, despite her ability to successfully complete all job tasks associated with her position. Christian further contended that she was harassed and ultimately terminated by her employer before she could commence pheresis treatments because of St. Anthony's refusal to arrange days off for recovery and due to St. Anthony's perceived high insurance costs associated with the regular treatments to be endured by Petitioner.

Christian was an exemplary employee for St. Anthony's, despite her suffering from the congenital disease in which her body overproduces cholesterol at levels four to five times the normal levels.[1] Immediately after Christian

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[1]Christian's cholesterol level placed her in the "serious"category; her "bad" cholesterol level was 447 to 507, compared to an acceptable range in normal patients of 100 - 130.

was diagnosed with hypercholesterolemia, she was placed on medications which proved unsuccessful; therefore the necessity of plasmapheresis became apparent and was recommended by Christian's specialist. Christian arranged, with the assistance of the Chicago Kidney Foundation, to obtain the requisite equipment from out-of-state and place said equipment at St. Anthony's, where Christian could participate in the treatments locally.[2]

After all arrangements were finalized to secure the needed equipment, Christian scheduled a meeting with her immediate supervisor and department supervisor to advise them of her diagnosis and the needed pheresis treatments. In addition, Christian sought to confirm that she would be able to apply her paid time off ("PTO") days, to ensure Christian would have enough recovery time before returning to work.[3] The reaction was not supportive as Christian had hoped; rather, both supervisors warned Christian that she would be fired, especially in light of the rising health care costs St. Anthony's was experiencing.

During the same time period, Christian sought full-time employment with St. Anthony's as the insurance premiums for part-time employees were to be raised two-fold. However, after Christian's disclosure to St. Anthony's,

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[2]Originally, since Chicago was not equipped with the plasmapheresis equipment, Christian was to travel to Boston for the necessary plasmapheresis treatments.

[3]St. Anthony's PTO policy combined vacation, personal holidays, calendars, and sick time; Christian was instructed PTO days could be used in any way desired by the individual employee, as long as said days were requested in advance.

Christian was denied applications for open full-time positions on at least six different occasions, despite the fact that she had the highest seniority of all part-time employees in her department. Christian also became subjected to harassment by her supervisors, which included being assigned the dirtiest, hardest jobs in the hospital, including tending to laundry which consisted of dirty needles, human defecation and vomit, and scrubbing floors, which tasks were never assigned to Christian before the disclosure of her affliction. On another occasion, Margaret was almost struck in the face by another supervisor. Christian's work performance was constantly criticized, although both evaluations proved Christian was rated above-average in every category.

Unfortunately, before Christian was able to commence said treatments, she was terminated by St. Anthony's for "falsifying her time card," for allegedly signing out at 12:00 midnight, but leaving the hospital before 11:55 p.m. (approximately five minutes early). St. Anthony's was unable to prove said allegation before the unemployment commission. Furthermore, Christian's co-employees verified that the standard practice in their department was to allow employees to clock out early. In fact, on the date in question, several employees clocked out at the same time, including Christian's supervisor.

On October 6, 1995, Christian filed her case in the United States District Court for the Northern District of Indiana. On February 16, 1995, this case was referred to Magistrate Andrew Rodovich with both parties' consent. On November 8, 1996, Magistrate Rodovich entered a summary judgment in favor of St. Anthony's. The Seventh Circuit affirmed the decision of the district court on July 1, 1997. On July 30, 1997, the Seventh Circuit refused to grant

Christian's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

Petitioner urges this Court to grant certiorari pursuant to Rule 10 because the decision of the Seventh Circuit Court of Appeals addresses an important federal question that has not been, but should be, settled by this Court. The Seventh Circuit has suggested that a medical condition that is not itself disabling but nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling is a disability within the meaning of the Americans with Disabilities Act. By holding that the treatment of a medical condition may afford an individual protection under the ADA, the Seventh Circuit has extended the meaning of the ADA on a case of first impression.

Furthermore, the failure of the Seventh Circuit to extend the "added rigor" standard in employment discrimination cases announced in previous Seventh Circuit cases and the Seventh Circuit's disdain of summary judgment evidence clearly demonstrates a departure from "accepted and usual course of judicial proceedings." For the foregoing reasons, this Court should grant the instant Petition.

I.

THIS CASE INVOLVES THE IMPORTANT QUESTION NOT ANSWERED BY THIS COURT WHETHER AN EMPLOYER'S INTERFERENCE WITH AN EMPLOYEE'S ABILITY TO OBTAIN NECESSARY, ALBEIT AGGRESSIVE, DISABLING TREATMENT VIOLATES THE AMERICANS WITH DISABILITIES ACT.

The Seventh Circuit addresses the possibility of extending protection under the ADA to an individual who suffers from a medical condition, itself not disabling, but nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling. As noted by the Seventh Circuit, this issue has not been decided (or even considered) by the Courts. The Appellate Court did, however, *cite Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907 [6 AD Cases 282] (11th Cir. 1996)*, a case in which the Court assumed chemotherapy treatment for a cancer itself not shown to be disabling could be disabling within the meaning of the Act.

The premise that a treatment may afford an individual protection under the ADA even when the medical condition itself does not render the claimant a "qualified individual with a disability" is unique; however, said premise as stated fails to reach as far as necessary and is, in fact, flawed.

The Court of Appeals argues that the ADA "protects people who are discriminated against by their employer . . . either because they are in fact disabled or because their employer mistakenly believes them to be disabled." Furthermore, the Court adds that Christian, assuming she was required to participate in plasmapheresis treatments (which

may then render her "disabled" under the definitions of the ADA), still has no claim under the ADA because she does not argue she was fired because pheresis would require her to miss work time.[4] The Court of Appeals fails to recognize the obvious.

Indeed, Christian surmised she was terminated because of her need for pheresis treatments; in fact, she clearly presented evidence of St. Anthony's harassment and blatant refusal to assist Christian in arranging PTO days around her treatments in order to assure Christian adequate recovery time before returning to work after each treatment. Indeed, Christian refuses to accept St. Anthony's contention that Christian was fired for "falsifying a time card" as St. Anthony's failed to present any evidence to support the same. Indeed, Christian was fired because of her condition that required extensive treatments, despite the Court of Appeals' refusal to accept the same.

Instead, the Seventh Circuit has announced that a treatment of a condition that is not itself disabling can count as a disability under the Act. However, the Seventh Circuit, in the same breath, refuses to blanket ADA protection on an individual such as Christian who has been terminated by her employer before she can ever obtain said treatment. This too is a discriminatory act which should automatically confer ADA protection upon such an individual. Otherwise, the message the Seventh Circuit is sending is wholly atrocious

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[4]The Court of Appeals states that Christian claims to not know why she was fired, but conjectures that it was either because of the stigma of having a serious medical condition or because of the cost of the treatment to St. Anthony's employee health plan.

and nonsensical: that an employer may lawfully terminate an otherwise qualified employee before he/she may commence medical treatment which may render the employee disabled under the ADA. That is the message uttered by the Seventh Circuit.

The Court of Appeals attempts to characterize Christian as an ill, even permanently ill, person, who would be afforded protection under the ADA had she begun pheresis treatments. However, the Court of Appeals fails to acknowledge that the termination of Christian by St. Anthony's before she could ever begin said treatments was merely a means to an end--an end that is discriminatory in nature.

As such, the Seventh Circuit's failure to adequately address an issue of first impression clearly mandates the exercise of this Court's discretion in granting certiorari.

II.

THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE PRIOR DECISION OF *SARSHA V. SEARS, ROEBUCK, & CO., 3 F.3D 1035 (7TH CIR. 1993)*, APPLYING THE SUMMARY JUDGMENT STANDARD WITH ADDED RIGOR IN EMPLOYMENT DISCRIMINATION CASES, WHERE INTENT AND CREDIBILITY ARE CRUCIAL ISSUES.

By its decision in *Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035 (7th Cir. 1993)*, and its decisions since that time based on *Sarsha*, the court of appeals borrowed the Federal Rule of Civil Procedure 56 standard previously announced by this court in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)*, in which summary judgment was deemed

appropriate only when the materials before the court demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, and clarifying that said standard shall be applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues. (*See McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 370-71 (7th Cir. 1992); McMillan v. Svetanoff, 878 F.2d 186, 188 (7th Cir. 1989)*).

However, the recent case of *Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560 (7th Cir. 1996)*, set out the applicable standard of review of a district court's grant of summary judgment in an ADA case:

> We assess the record de novo and reach our own conclusions regarding law and fact. We will not resolve factual disputes or weigh conflicting evidence. We will only determine whether a genuine issue of material fact exists for trial, which is the case where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." In reaching a conclusion as to the presence of a genuine issue of material fact, we must view the evidence and draw all inferences in a way most favorable to the nonmoving party. Where there is no genuine issue of material fact, the sole question is whether the nonmoving party is entitled to judgment as a matter of law. If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of

> proof at trial, summary judgment must be granted to the moving party.

Id. at 562 [citations omitted].

Judged by the recent holding of *Bombard*, the Court of Appeals' treatment of summary judgment in a case involving the ADA, an ADA petitioner opposing a motion for summary judgment is charged with an additional burden than that of an employment discrimination petitioner (presumably filing a claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(5), as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981, or the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*), as *Bombard* does not afford the ADA petitioner the security that the court will apply the summary judgment standard with "added rigor" in an ADA case.

As opined in a recent case hailing from the Third Circuit, *Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (1996)*:

> Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind. As one court has recognized, "[d]efendants of even

> minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it." But regardless of the form that discrimination takes, the impermissible impact remains the same, and the law's prohibition remains unchanged. . . .

[Citations omitted.] All discrimination cases are similar in nature, whether filed in response to discrimination based upon one's race, religion, gender, sex, national origin, disability, pregnancy, age, or otherwise. Whatever the reasoning is behind the discrimination, especially in an employment context, the end result is the same--the wrongful harassment and/or termination of an employee.

As pointed out by the Third Circuit, employers today are fully aware of the employment laws protecting the rights of employees; however, employers can easily mask the true (discriminatory) reason for terminating an employee by coming up with any legitimate non-discriminatory basis for said termination that sounds worthy of lending credence to said reason. However, as indicated by the Third Circuit in *Aman*:

> The sophisticated would-be violator has made our job a little more difficult. Courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct, and "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled . . . because of crabbed notions of relevance or excessive mistrust of juries."

[Citations omitted.] Obviously the issues of intent and credibility are crucial in any discrimination context, not just discrimination for a reason protected under Title VII.

Because the Seventh Circuit's announcement in *Bombard* that individuals seeking relief under the ADA are not afforded the "added rigor" enjoyed by Title VII plaintiffs, this decision is in direct conflict with its earlier decision of *Sarsha*. All motions for summary judgment filed in connection with a claim for discriminatory treatment in the employment context shall be scrutinized with "added rigor" since the issues of intent and credibility are cardinal to the case. As such, common sense dictates the "added rigor" standard should be extended to encompass all employment discrimination, including ADA claims.

III.

THE DECISION OF THE COURT OF APPEALS REJECTING THE CLEAR ADEQUACY OF PETITIONER MARGARET CHRISTIAN'S SUMMARY JUDGMENT EVIDENCE, IS INCONSISTENT WITH THE PROPER APPLICATION OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE DECISION OF THIS COURT IN *ANDERSON V. LIBERTY LOBBY, INC., 477 U.S. 242, 250 (1986).*

This court set out a uniform standard of review applicable to summary judgment motions in discrimination cases made under Rule 56 of the Federal Rules of Civil Procedure. This standard, as set forth in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)*, states that where evidence exists upon which a jury could reasonably find for the non-moving party, the reviewing court must reverse the

decision of the lower court granting summary judgment against the non-moving party. Furthermore, the Seventh Circuit announced when reviewing a motion for summary judgment, all inferences are to be drawn "in the light most favorable to the non-moving party" (Christian herein). *Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996).*

Judged by that holding, the Court of Appeals' treatment of the evidence submitted by Christian was inconsistent with this Court's definition of reviewing the evidence and also the Seventh Circuit's holding that inferences are to be drawn in favor of the non-moving party, namely Christian herein. Christian's summary judgment evidence well established at least two triable issues of fact with respect to her specialist's recommendation that Christian commence plasmapheresis treatments to ameliorate her hypercholesterolemia and that St. Anthony's terminated Christian because her pheresis treatments would require Christian to miss work, both of which were blatantly ignored by the panel to an extent that said refusal to consider Christian's evidence was in any objective sense very compelling and even overwhelming.

First, Christian's specialist from the University of Chicago tested Christian and determined Christian's body overproduced cholesterol at a rate of 400 - 500% the average production rate. On various occasions, Christian's cholesterol level was analyzed to be anywhere between 376 and 507, as compared to the normal level of 100 to 130. Second, Christian was initially placed on medications, which however, proved unsuccessful. Third, Christian was notably losing muscle tone when tested on a machine analyzing levels of fats and lipids. Fourth, Christian was determined to

have the circulation in her eyes of a sixty to seventy year-old woman, suffered from blockage and calcification in her neck arteries and shortness of breath. Fifth, Christian was admonished she would either have a heart attack or a stroke because of her severe cholesterol levels.

As to the second triable issue of fact, Christian presented evidence including St. Anthony's utilization of PTO days (i.e., combined vacation days, personal holidays, calendar holidays, and sick days). Second, Christian was advised by the Human Resources Manager at St. Anthony's that PTO days could be used for whatever reason she wished. Third, Christian was advised that PTO days simply had to be scheduled beforehand with her supervisor, but in the case of unexpected illness or emergency. Fourth, Christian was advised PTO days could be used for medical purposes. Fifth, Christian was advised she could make arrangements for PTO days up to one year in advance. Sixth, Christian was advised she would need three days off following every pheresis treatment for recuperation. Seventh, as soon as Christian disclosed the need for pheresis and requested to apply PTO days immediately after said treatments, Christian was advised suddenly St. Anthony's only granted PTO days based upon seniority and she could not schedule PTO days in advance. Eighth, Christian was admonished St. Anthony's would not "put up with this" and if she insisted on taking PTO days after a treatment without prior approval, she would be fired. Finally, Christian's supervisor refused to work with Christian to arrange a work schedule accommodating her pheresis treatments.

However, despite the above-stated evidence presented to the Court, the Court of Appeals had the audacity to state it was "extremely unlikely, to say the least, that pheresis was

the indicated treatment for the plaintiff's condition," and that Christian "does not argue she was fired because pheresis would require her to miss some work time," obviously completely disregarding not only the submitted evidence, but also its obligation to view the inferences in the light most favorable to the non-moving party. The Court of Appeals attempts to distinguish between optional and required treatments, finding pheresis was merely an "option" to Christian.

Thus, under the very holding of the Court of Appeals, the *Bultemeyer* decision, and *Anderson*, Christian's claims were clearly triable on the grounds identified by the Court of Appeals. The decision of the Court of Appeals to the contrary was therefore a violation of Rule 56 and inconsistent with this Court's decision in *Anderson*. In order to uphold Rule 56, this Court should review and reverse the decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3986
MARGARET CHRISTIAN,

Plaintiff-Appellant,

v.

ST. ANTHONY MEDICAL CENTER, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division, No. 95 C 322 - **Andrew P. Rodovich**, *Magistrate Judge.*

ARGUED MAY 12, 1997 - DECIDED JULY 1, 1997

Before POSNER, *Chief Judge*, and EASTERBROOK and EVANS, *Circuit Judges.*

POSNER, *Chief Judge*. Margaret Christian was fired by St. Anthony's Medical Center, she claims in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* She has a condition known as hypercholesterolemia, meaning an excessive amount of cholesterol in her blood (her

cholesterol count is 319 millograms [sic], which is far above normal), and she claims that St. Anthony's fired her because of her condition. The magistrate judge granted summary judgment for St. Anthony's precipitating this appeal. A number of issues are raised, but only two merit discussion. The first is whether the treatment of a condition that is not itself disabling can ever count as a disability under the Act, and we think that it can. Obviously, having high cholesterol is not in itself disabling; it does not prevent a person from engaging in any of the activities of living and working; it is wholly unlike blindness or paraplegia or the other conventional disabilities that trigger the protection of the ADA. But it is life-threatening, albeit only in the long term, and if a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a disability within the meaning of the Act, even though the disability is, as it were, at one remove from the condition. We cannot find a case on the question, but the answer seems obvious--maybe that's why there are no cases; in *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907 (11th Cir. 1996), for example, it was simply assumed that chemotherapy treatment for a cancer not itself shown to be disabling could be disabling within the meaning of the Act. In its early stages cancer is usually not disabling, but aggressive treatment of a cancer at an early stage may be, and if it is, the protections of the Act are triggered. And we suppose, coming a little closer to this case, that if the aggressive, disabling treatment had been recommended but not yet been commenced, the patient could complain if his employer fired him because it anticipated the disability that would result

from the treatment; for on these assumptions the disability would be the cause of his being fired.

The plaintiff claims that this is her situation, that she was fired because the defendant anticipated that she would undergo a disabling treatment--namely pheresis (or aphereisis), in which the blood is drained from the patient's body, cleansed of its cholesterol, and put back into the patient. This treatment, which would have continued for the rest of the plaintiff's life, would have required the defendant to allow the plaintiff to take an extra day or two off each month to undergo the treatment.

If Christian's employer fired her because the indicted medical treatment for her condition would have required that she have this extra time off, the employer would be violating the ADA, at least prima facie, though we wish to note two qualifications. The first is that the disabling treatment be truly necessary, and not merely an attractive option. For suppose a doctor tells his middle-aged patient that unless he "slows down," his longevity will be impaired--and the patient then demands that his employer allow him to work only three days a week. The prescribed "treatment" would be disabling, all right, but it would not require an accommodation by the employer, for the condition being treated would be too vague and remote and the treatment too conjectural. Second, an anticipated disability does not trigger a duty of accommodation if what is anticipated is a consequence of the employee's voluntary choices. It is not a violation of the Act to fire an employee who because of his known propensity to engage in recklessly dangerous activities, such as riding a

motorcycle without a helmet on, has a more than average likelihood of becoming disabled.

Coming back to this case, we point out that it is extremely unlikely, to say the least, that pheresis *was* the indicated treatment for the plaintiff's condition. Tens of millions of Americans have high cholesterol; few have their blood drained every month--apparently none in Chicago, since the plaintiff's plan was for the required equipment to be flown in from Boston every month for her treatment. In fact, she has never undergone the treatment, and her treating physician has prescribed drugs and exercise for her, not pheresis. It is an example of our earlier point about the difference between optional and required treatments. But this is an aside; even if it were certain that Christian's condition required pheresis, she has no claim under the ADA.

For she does not argue that she was fired because pheresis would require her to miss some work time. She claims not to know why she was fired (she rejects the employer's contention that it was because she falsified her time card), but conjectures that it was either because of the stigma of having a serious medical condition or because of the cost of the treatment to St. Anthony's employee health plan. She believes in other words that the Americans with Disabilities Act protects an employee from being fired because of illness. It does not. This is a subtle but important point and we wish to be as emphatic about it as we can. The Act is not a general protection of medically afflicted persons. It protects people who are discriminated against by their employer (the only form of disability discrimination at issue in this case) either because they are in fact disabled or

because their employer mistakenly believes them to be disabled. If the employer discriminates against them on account of their being (or being believed by him to be) ill, even permanently ill, but not disabled, there is no violation. E.g., *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (hemophilia).

Suppose that the plaintiff had a skin disease that was unsightly and also very expensive to treat, but neither the disease itself nor the treatment for it would interfere with her work. And suppose her employer fired her nevertheless, either because he was revolted by her disfigured appearance or because the welfare plan that he had set up for his employees was unfunded and he didn't want to incur the expense of the treatment that she required. Either way he would not be guilty of disability discrimination, cf. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-14 (1993), though in the second case, if the welfare plan were an ERISA plan, he might be guilty of violating ERISA. *Id.* at 612; *Salus v. GTE Directories Service Corp.*, 104 F.3d 131 (7th Cir. 1997); see 29 U.S.C. § 1140. It would be otherwise if he believed that the plaintiff's skin disease was disabling, even if it was not; for the Act protects persons who are not disabled from being discriminated against on the basis of the false beliefs of their employers. 42 U.S.C. § 12102(2)(C); *Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818 (7th Cir. 1997); *Vande Zande v. Wisconsin Dept. of Administration*, 44 F.3d 538, 541 (7th Cir. 1995). By the plaintiff's own account, however, the defendant's motive in firing her had nothing to do with any disability resulting directly or indirectly from her high cholesterol. The motive was either a dislike of a person with "bad blood" or a belief

that the treatment for the condition would take a big bite out of the employer's profits; neither motive is necessarily or here related to an actual or perceived disability.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 30, 1997

Before

HON. RICHARD A. POSNER, Chief Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. TERENCE T. EVANS, Circuit Judge

No. 96-3986

MARGARET CHRISTIAN,

Plaintiff-Appellant,

v.

ST. ANTHONY MEDICAL CENTER, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division, No. 95 C 322 - **Andrew P. Rodovich**, *Magistrate Judge.*

ORDER

On July 15, 1997, plaintiff-appellant filed a petition for rehearing en banc. All the judges on the original panel

have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition for rehearing is therefore DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 1, 1997

Before

HON. RICHARD A. POSNER, Chief Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. TERENCE T. EVANS, Circuit Judge

No. 96-3986

MARGARET CHRISTIAN,

Plaintiff-Appellant,

v.

ST. ANTHONY MEDICAL CENTER, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division, No. 95 C 322 - **Andrew P. Rodovich**, *Magistrate Judge.*

JUDGMENT - WITH ORAL ARGUMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

MARGARET CHRISTIAN)
Plaintiff)
v.)
)Case No. 2:95-cv-322
ST. ANTHONY'S)
MEDICAL CENTER, INC.)
Defendant)

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the motion for summary judgment filed by the defendant, St. Anthony's Medical Center, Inc., on July 31, 1996, is granted.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

Dated: November 1996

Stephen R. Ludwig, Clerk

By /s/ Edward Ciba
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MARGARET CHRISTIAN)
Plaintiff)
v.)
)Case No. 2:95-cv-322
ST. ANTHONY'S)
MEDICAL CENTER, INC.)
Defendant)

ORDER

This matter is before the court on the Motion for Summary Judgment filed by the defendant, St. Anthony's Medical Center, Inc., on July 31, 1996. For the reasons set forth below, the motion is **GRANTED**.

Background

St. Anthony's Medical Center, Inc. ("SAMC") hired Margaret Christian on September 24, 1990, to work as an environmental services aide in the hospital's housekeeping department. Her duties involved keeping various areas of the hospital clean. Christian remained in environmental services until her termination on March 15, 1993.

In April of 1992, a doctor at the University of Chicago diagnosed Christian as having familial hypercholesterolemia, a hereditary condition which results in dangerously high cholesterol levels in the blood. Hypercholesterolemia can lead to several serious health

problems including heart attacks and strokes. Christian was told that the condition was treatable with a combination of drugs and a process called "LDL pheresis" in which the patient's blood is extracted from the body, the excess cholesterol is removed, and the clean blood is returned to her body. However, at the time of her termination, Christian did not suffer from any outward manifestations of her condition and had not begun the pheresis treatments. In her deposition, she repeatedly stated that she always was able to perform the tasks assigned to her and that she did not ask SAMC to change her job duties because of her condition. (Christian Deposition, p. 106) After her termination at SAMC, Christian worked 12-hour shifts at a plastics factory until July of 1995. She currently is employed at the restaurant that she co-owns with her husband where she works as a manager, waitress, hostess and bookkeeper.

SAMC asserts that it terminated Christian after determining that she had falsified her time card on February 28, 1993. Christian acknowledges that she signed out on her time card "around" 11:45 P.M. indicating that she would be leaving at midnight, the scheduled end of her shift, but maintains that she did not leave until midnight. Her supervisor, Sandra Rae, noticed that she was not near the time clock at midnight and asked if anyone had seen Christian. When no one had, Rae looked for Christian briefly but could not find her. Rae subsequently reported the incident to Gordon Craig, the director of the Environmental Services Department. Craig suspended Christian on March 8, 1993, and terminated her seven days later. Christian was given an instruction packet describing the process by which she could contest her termination and was

afforded an opportunity to present witnesses who would testify that she was at the hospital until the end of her shift. Until recently, Christian failed to produce anyone who would testify that she actually was at the hospital until the end of her scheduled shift.

Of the people involved in the decision to terminate Christian, only Rae and Craig knew of Christian's medical condition prior to the time card incident. Interestingly, Rae also suffers from hypercholesterolemia. Craig stated in his affidavit that he was aware that Christian had a "blood condition" but did not know the specifics of the condition, and in any case, did not consider her to be a disabled person. Charles Kleinschmidt, one of SAMC's vice presidents, and Janet Whitaker, the Director of Human Resources, stated in their affidavits that they did not know of Christian's condition until after she had been suspended.

Christian contends that SAMC discriminated against her because of her disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 et. seq. Although she asserts a plethora of facts and inequities in her response to SAMC's Motion for Summary Judgment, she essentially is claiming that she is a "qualified individual with a disability" who was fired because of that disability. In the alternative, she argues that even if she was not disabled as defined by the ADA, SAMC "regarded" her as disabled and fired her as a result of its discriminatory attitude toward her condition and its fear that it would have to cover substantial future medical bills.

Discussion

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only if it is demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kennedy v. Children's Service Society of Wisconsin, 17 F.3d 980, 983 (7th Cir. 1994); Dempsey v. Atchison, Topeka and Santa Fe Railway Company, 16 F.3d 832, 836 (7th Cir. 1994); Southmark Corporation v. Cagan, 999 F.2d 216, 223 (7th Cir. 1993). The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 160, 90 S.Ct. 1598, 1610, 26 L.Ed.2d 142, 155 (1970); Green v. Whiteco Industries, Inc., 17 F.3d 199, 201 (7th Cir. 1994); Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1195 (7th Cir. 1990). A fact is material if it is outcome determinative under applicable law. Derrico v. Bungel International Manufacturing Company, 989 F.2d 247, 250 (7th Cir. 1993); Marshall v. Allen, 984 F.2d 787, 789 (7th Cir. 1993); First Indiana Bank v. Baker, 957 F.2d 506, 508 (7th Cir. 1992). Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. Lawshe v. Simpson, 16 F.3d 1475, 1478 (7th Cir. 1994); Dempsey, 16 F.3d at 836; Fleischfresser v. Directors of School District 200, 15 F.3d 680, 685 (7th Cir. 1994). Finally, summary judgment generally is not an appropriate means of resolving questions of motive and intent. Roger v. Yellow Freight Systems, Inc., 21 F.3d 146, 148 (7th Cir. 1994); Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1261 (7th Cir. 1993); Lac Du Flambeau

Indians v. Stop Treaty Abuse-Wisconsin, Inc., 991 F.2d 1249, 1258 (7th Cir. 1993); United Association of Black Landscapers v. City of Milwaukee, 916 F.2d 1261, 1268 (7th Cir. 1990).

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.
>
> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)

See also: Celotex Corporation v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 273 (1986); Kennedy, 17 F.3d at 983; Essex Insurance Company v.

Stage 2, Incorporated, 14 F.3d 1178, 1181 (7th Cir. 1994); Derrico, 989 F.2d at 249.

It must be noted, however, that not every factual dispute creates a barrier to summary judgment. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. See also Tolle v. Carroll Touch, Inc., 23 F.3d 174, 178 (7th Cir. 1994).

ADA

The ADA prohibits discrimination against disabled individuals. 42 U.S.C. § 2101 et. seq. A plaintiff may prove such discrimination by establishing a prima facie case either through direct or circumstantial evidence or through the indirect, burden-shifting method of proof established in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) which later was adapted to ADA claims. DeLuca v. Winer Industries, Incorporated, 53 F.3d 793, 797 (7th Cir. 1995). Christian has relied upon the McDonnell Douglas method to establish a prima facie case.

As to the outset, it must be determined whether Christian is disabled within the meaning of the ADA. The issue of whether Christian is a member of the protected class is a matter of law. The protected class under the ADA encompasses "qualified individual[s] with a disability," which is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the

essential functions of the employment position that such individual holds or desires." 42 U.S.C. §§12112 and 12111(8). A "disability" is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.
>
> 42 U.S.C. § 2102(2)

The only issue here is whether Christian satisfies the definition of "disability." SAMC contends that Christian is not a qualified individual with a disability because she is not substantially limited in a major life activity, nor is she regarded as having such an impairment.

A physical impairment is defined as any physiological disorder that affects one of the body's systems, such as the blood system. 20 C.F.R. §1630.2(h)(1). Major life activities are basic activities that the average person could perform with little or no difficulty. 29 C.F.R. Part 1630(I) Appendix. Examples of major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. §1630(I). Section 1630.2(j) defines the term "substantially limits" to mean:

> (I) Unable to perform a major life activity that the average person in the general population can perform; or

> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

To determine whether a substantial limitation upon a major life activity exists depends upon an analysis of 1) the nature and severity of the impairment, 2) the duration of the impairment, and 3) the permanent or long-term impact of the impairment. 29 C.F.R. §1630.2(j); Homever v. Stanley Tulchin Associates, Inc., 91 F.3d 959, 962 (7th Cir. 1996).

Although Christian has addressed this point only summarily, the court must determine whether she has a "physical or mental impairment that substantially limits one or more of the major life activities." Hypercholesterolemia is a physical impairment because it is a physiological function that involves the blood (or hemic) system. So the question becomes whether Christian is substantially limited in any of her major life activities.

Christian's own deposition testimony is dispositive of this issue. In response to several questions related to her ability to perform her job at SAMC, Christian unequivocally stated that she always was able to perform her tasks. (Christian Deposition, p. 106) After SAMC terminated her, she held a job at a plastics factory and currently works at her family restaurant. (Christian Deposition, pp. 43, 45) Although her condition appears to be permanent and serious,

she does not assert that she has had difficulties performing any of the functions associated with any of her jobs. She is not significantly restricted in the performance of her job as compared to the performance of an average person. Therefore, Christian does not have a disability within the meaning of the ADA.

The inquiry does not end there however. The ADA also protects individuals who, despite being able to function normally, are "regarded as" having a disability. 42 U.S.C. §12102(2)(C). Regarded as having an impairment is further defined as:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. §1630.2(l)

Christian contends that SAMC regarded her as having an impairment that substantially limited her major life activity of working. When a plaintiff claims that her employer regards her as having a qualifying impairment, "it is not enough to show that the employer perceived the employee as impaired," but rather "the perceived impairment must substantially limit a major life activity." Duff v. Lobdell-Emery Manufacturing Company, 926 F.Supp. 799, 806 (N.D. Ind. 1996) (quoting Marschand v. Norfolk & Western Ry. Co., 876 F.Supp. 1528, 1540 (N.D. Ind. 1995)). Not every impairment that affects an individual's major life activities is a substantially limiting impairment; the impairment must significantly restrict the extent to which the individual can perform a major life activity. Best v. Shell Oil Co., 910 F.Supp. 405, 410 (N.D. Ill. 1995). A federal court may not decide the wisdom or fairness of a particular course of action taken by an employer as long as the employer has not violated any federal law in making its decision.

Christian's own testimony strongly demonstrates that SAMC did not regard her as being impaired at all. After finding out about her condition, the hospital continued to require her to perform all of the tasks that she had been performing, as well as adding some more strenuous and less pleasant chores. (Plaintiff's Response to Motion for Summary Judgment, p. 14) In fact, SAMC required her to work in the kitchen at a job "which should have been done by two men, but was given solely to Margaret to perform, which involved scrubbing machines, scrubbing the floors and working inside walk-in coolers." (Plaintiff's Response to Motion for Summary Judgment, p. 15) These allegations do not lead to the inference that SAMC considered Christian to

be disabled in any way; they indicate that SAMC believed that Christian was capable of doing all of the tasks which were assigned to her. See Duff, 926 F.Supp. at 808. All of this evidence taken together leaves no room for a reasonable fact finder to conclude that SAMC regarded Christian as having a physical impairment that substantially limited one or more of her major life activities.

In a very similar case, Hamm v. Runyon, 51 F.3d 721 (7th Cir. 1995), the Seventh Circuit affirmed summary judgment for the U.S. Postmaster in a Rehabilitation Act case which hinged on the "regarded as" language of the Rehabilitation Act. The Postal Service had terminated the plaintiff for unsatisfactory attendance during the plaintiff's probationary period. The plaintiff claimed that the Postal Service had discriminated against him in violation of the Rehabilitation Act because it regarded him as having a disability and terminated him on that basis. The plaintiff alleged that his supervisor had noticed that he had some difficulty in walking due to a previous arthritic condition and had asked about his health. The defendant stated that he believed that the plaintiff's problems were short-term and that the plaintiff could work around them. The plaintiff did not contend that he had an impairment which substantially limited one of his major life activities and insisted that he never considered himself to be disabled and could at all times perform the tasks associated with his job.

The Court of Appeals first stated that the plaintiff had the burden of proving that the Postal Service terminated him because it regarded him as having a disability. Hamm, 51 F.3d at 725. The Court of Appeals then affirmed summary

judgment for the Postal Service due to the lack of evidence as to whether the plaintiff's supervisors regarded him as having a disability. The Court of Appeals noted that the plaintiff continued to do all of the functions of his job and gave every indication that he would continue doing so and stated that "many impairments do not impact on an individual's life to the degree that they constitute disabling impairments." Hamm, 51 F.3d at 726. The same reasoning applies to this case.

Christian has alleged that the time card incident was not the real reason for her termination. However, this argument has relevance only if Christian can establish a prima facie case under the McDonnell Douglas standard. Because she has failed to meet her initial burden, the issue of pretext need not be addressed.

Christian also alleges that the hospital terminated her because it was concerned about the costs of her potential pheresis treatment. At the time of her termination, Christian had not decided to undergo the pheresis treatment, and to date, she still has not submitted to that therapy. Christian has offered no evidence to support the allegations that the hospital was concerned about the medical expenses and the impact on the group insurance plan. The only support which she has offered for these allegations is deposition testimony about conversations where supervisors indicated that the hospital was concerned about the Clinton health care plan. Christian has not submitted any indication of how the pheresis treatment would impact upon the hospital or affect its insurance premiums. Such speculation does not create a genuine issue of fact sufficient to defeat a motion for

summary judgment. Hedberg v. Indiana Bell Telephone Company, Inc., 47 F.3d 928, 932 (7th Cir. 1995).

Even assuming that the hospital was concerned about the cost of the pheresis treatment, Christian has not cited any case authority holding that an employment decision affected by medical costs comes within the scope of the ADA. This court's independent research also has failed to disclose a reported decision supporting this contention. This claim must fail both factually and legally.

As a final matter, the admissibility of the Affidavit of Ala Huckabay must be addressed. The plaintiff filed this affidavit on October 8, 1996. The plaintiff claims that the affidavit was timely filed (Certification, ¶ 7), that the plaintiff's counsel could not locate Huckabay's phone number because he was unsure of the spelling of her last name (Certification, ¶ 2), and that after many attempts of trying to contact Huckabay, he was unable to reach her until September 28, 1996 (Certification, ¶¶ 3, 4, 5). The court did not and will not consider this affidavit in deciding the motion.

First, the plaintiff clearly went beyond the discovery cutoff, which was September 2, 1996. Second, the defendant turned over Huckabay's name and the correct spelling during discovery on June 28, 1996 (Plaintiff's Exh. 18). Third, if the plaintiff's counsel was having difficulty locating a witness, he had a duty to request an extension of time to respond to the motion for summary judgment. See Federal Rule of Civil Procedure 56(f). For all of these reasons, Ala Huckabay's affidavit will not be considered.

For the foregoing reasons, the Motion for Summary Judgment filed by the defendant, St. Anthony's Medical Center, Inc., on July 31, 1996, is **GRANTED**.

ENTERED this 6 day of November, 1996

/s/

Andrew P. Rodovich
United States Magistrate Judge

STATUTES AND RULES

§ 12102. Definitions

As used in this chapter:

* * *

- (2) Disability

  The term "disability" means, with respect to an individual--

  - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

  - (B) a record of such an impairment; or

  - (C) being regarded as having such an impairment.

§ 12111. Definitions

As used in this subchapter:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

§ 12112. Discrimination

- (a) General rule

  No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

FRCP 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits: Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.